No. 528

In the Supreme Court of the United States

OCTOBER TERM, 1948

HAROLD ROLAND CHRISTOFFEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

CITATIONS

Cases—Continued

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 528

HAROLD ROLAND CHRISTOFFEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 10) denying petitioner's motion to dismiss the indictment is not reported. The opinion of the Court of Appeals (R. 275–277) is reported at 171 F. 2d 1004.

JURISDICTION

The judgment of the Court of Appeals was entered on November 22, 1948 (R. 278), and a petition for rehearing was denied on December 14, 1948 (R. 284). The petition for a writ of certiorari was filed on January 28, 1949, within the time as extended (R. 286), and was granted on March 28, 1949 (R. 287). The jurisdiction of

this Court is conferred by 28 U. S. C. 1254 (1). See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

Petitioner was convicted of perjury committed while testifying before the Committee on Education and Labor of the House of Representatives during that Committee's afternoon session on March 1, 1947. The principal questions presented are:

1. Whether the trial court was correct in charging the jury that if a quorum of the Committee (a majority) met at the beginning of the afternoon session and no question was raised during the session as to a lack of a quorum, the fact that a majority did not actually remain throughout the session did not affect the Committee's competence to administer oaths and take testimony.

2. Whether the giving of false testimony under oath before a congressional committee in the District of Columbia constituted a violation of the local District of Columbia perjury statute as distinguished from the federal perjury statute; and, if not, the elements of the offense being the same under both statutes, whether the general sentence imposed on petitioner, which was well within the maximum which might have been imposed under the federal statute on the five counts on which he was convicted, should be vacated.

3. Whether the trial court was correct in refusing to disqualify the jury panel and to permit

petitioner access to government counsel's notes on the basis of his counsel's unsupported allegation that the Government may have investigated the panel.

STATUTES INVOLVED

The federal perjury statutes (18 U. S. C. (1946 ed.) 231 and 232, Criminal Code, §§ 125, 126 (now 18 U. S. C. 1621 and 1622)), provided, as of the dates involved here:

> SEC. 231. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years.
>
> SEC. 232. Whoever shall procure another to commit any perjury is guilty of subornation of perjury, and punishable as in section 231 of this title prescribed.

The District of Columbia perjury statute (22 D. C. Code (1940), 2501) provides:

> Every person who, having taken an oath or affirmation before a competent tribunal, officer, or person, in any case in which the law authorized such oath or affirmation to

be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed is true, wilfully and contrary to such oath or affirmation states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury; and any person convicted of perjury or subornation of perjury shall be punished by imprisonment in the penitentiary for not less than two nor more than ten years. Any such false testimony, declaration, deposition, or certificate given in the District of Columbia, but intended to be used in a judicial proceeding elsewhere, shall also be perjury within the meaning of this section.

STATEMENT

On September 3, 1947, a six-count indictment was filed in the District Court for the District of Columbia charging petitioner with the commission of various perjuries while testifying before the Committee on Education and Labor of the House of Representatives. The indictment alleged generally that the Committee was engaged on March 1, 1947, in conducting hearings to inquire into the causes of labor disputes, work stoppages and strikes, and the connections those engaged in such activities might have with subversive organizations; that it became material to take sworn testimony to determine whether certain labor organizations in Milwaukee, Wis-

consin were controlled by members of the Communist Party or by persons committed to Communist doctrines and purposes; that since petitioner had been in a dominant position in these labor organizations it became material to determine his connection with Communist organizations; and that petitioner appeared and testified under oath. The six counts of the indictment charged respectively that petitioner testified falsely and wilfully that he had never been a member of the Comunist Party, that he had never been a member of the Communist Political Association, that he had never worked with either of these organizations, that he had never participated in the activities of the Communist Party, that he had never supported Communists or indorsed Communism, and that he did not know Ned Sparks or Fred Blair, both allegedly former heads of the party in Wisconsin (R. 1–8). The heading of the indictment referred to Section 2501 of Title 22 of the D. C. Code, *supra,* the District of Columbia perjury statute. (R. 1).

Before trial, petitioner moved that the indictment be dismissed on the ground, *inter alia,* that since the alleged offenses pertained to the Federal Government, the prosecution should have been brought under the federal perjury statute rather than under the District of Columbia perjury statute. The court denied the motion, holding that the indictment properly charged offenses

under the federal statute, regardless of the statute in the mind of the drafters of the indictment, and that in any event there is no essential difference between the two statutes (R. 8–10).

In the course of the *voir dire* examination of the jury panel, the following requests by the petitioner's counsel and rulings by the trial court occurred (R. 29–30):

> Mr. Rogge [Petitioner's Counsel]. I notice Government counsel have an additional set of pages with reference to the jurors, which apparently contain additional information. I am asking for a copy of that so that we may have the same benefit of the same information that the Government has.
>
> The Court. That will be denied.
>
> Mr. Rogge. I also want to make this observation, that this was raised as an objection in the Sedition Case and the Judge disqualified that panel and we started with a new panel. If it is true, as I think from the sheets that I see in the Government's possession, that they have had an F. B. I. investigation made of the jury, I raise that, if Your Honor please, as an objection to this panel and I refer to the action Chief Justice Eicher took in the Sedition Case where, as I say, he disqualified the panel, even though that had been done without any of the members of the panel knowing anything about it, he nevertheless disqualified the panel.
>
> The Court. Very well. That is denied.

In a stipulation filed in the court below, petitioner in effect admitted that there was substantial evidence to prove that he had testified falsely before the Committee (R. 272–273), and he does not here challenge the sufficiency of the evidence for that purpose.

The Government presented evidence to show that the House Committee on Education and Labor was regularly constituted and that it was composed of 25 members (R. 30–32). The Committee clerk who took the roll at the afternoon session on Saturday, March 1, 1947, when petitioner appeared, testified that 14 members of the Committee were present when that session opened shortly after 2:00 p. m. (R. 32–38); that the Committee adjourned at 5:25 p. m. (R. 34); that petitioner's testimony was given during the latter part of the session (R. 37, 49–52); and that he was not certain how many members were present when petitioner was sworn and testified (R. 42, 69), but that at no time during the session did any member suggest the lack of a quorum (R. 39). The Chairman of the Committee and 12 other members testified that they were present at the beginning of the afternoon session (R. 86, 164, 181, 185, 191, 192, 198, 205, 208, 212, 219, 224, 229). The Chairman also testified that there was no suggestion during the session of a lack of a quorum (R. 112–113).

Throughout the trial, petitioner insisted that the Government must prove that a quorum of

the Committee was present at the exact time when he was sworn and testified (see, e. g., R. 9, 33, 36–40, 120–138, 233–239). He offered evidence tending to show that a quorum was not present at that time (see, e. g., R. 97, 103–104, 150.) The trial judge ruled, however, that the Government need only show that a quorum was present at the beginning of the session, provided that thereafter no point of lack of a quorum was raised (R. 119, 173–174). The jury was instructed as follows (R. 259–260):

> "And in this connection I wish to instruct you that the first thing that must be proved in this case is that the defendant was sworn to testify before a competent tribunal. If the tribunal before which he testified was not a competent tribunal, he cannot be convicted of perjury. The indictment alleges that the defendant testified before a meeting of the Committee on Education and Labor of the House of Representatives. To constitute a meeting of the Committee there must be present a majority of the Committee, and by present I mean actually physically present. In this case the Committee being composed of 25, before you could have a meeting of that Committee there must have been physically present at least 13 members of that Committee in the committee room. If such a Committee so met, that is, if 13 members did meet at the beginning of the afternoon session of March 1, 1947, and thereafter during the

> progress of the hearing some of them left temporarily or otherwise and no question was raised as to the lack of a quorum, then the fact that the majority did not remain there would not affect, for the purposes of this case, the existence of that Committee as a competent tribunal provided that before the oath was administered and before the testimony of the defendant was given there were present as many as 13 members of that Committee at the beginning of the afternoon session. If you find that 13 members were not present at the beginning of the afternoon session on March 1, 1947, or have a reasonable doubt that they were, then of course you need go no further, because there would not be a competent tribunal in this case before which the testimony was given and your verdict should be not guilty.

The jury returned a verdict of guilty on all six counts of the indictment (R. 22, 268). The court granted a judgment of acquittal as to the second count (R. 22, 271), and imposed a general sentence of imprisonment for a period of two to six years on the other five counts (R. 23, 272).

In the Court of Appeals, counsel for petitioner stipulated that the only points "which will be made and argued by the appellant" would be the sufficiency of the indictment to charge an offense under the District of Columbia perjury statute, the trial court's ruling on the quorum issue, and its refusal to dismiss the jury panel

because of the alleged F. B. I. investigations of members of the panel (R. 272–274). After the judgment had been affirmed (R. 278), a petition for rehearing was filed in which several new points were raised for the first time in the Court of Appeals, including the trial court's denial of a defense request that certain witnesses be subpoenaed at Government expense, or their depositions taken, and the trial court's refusal to permit defense counsel to read to the jury certain portions of the transcript of petitioner's testimony before the Committee (R. 282–283). The petition was denied without opinion (R. 284).

SUMMARY OF ARGUMENT

I

The authority under which the Committee was operating at the time petitioner testified falsely under oath supports the trial court's instruction to the jury concerning the Committee's competency to administer oaths and take testimony. The House of Representatives prescribed, as it had the constitutional right to do, that the Committee should operate under the same rules as the House itself. And the parliamentary practice of the House, established by its rules and precedents, is that if a quorum is present at the beginning of the session, the business accomplished before the lack of a quorum is brought to the notice of the chair is not thereafter subject to challenge on that

score. This Court has held that it will not interfere with Congressional procedure so long as it does not violate any fundamental rights. *United States* v. *Ballin*, 144 U. S. 1. Petitioner has not shown that the alleged absence of an actual majority at the time he testified violated any of his fundamental rights. He intended to mislead not only the members present but the whole Committee and the House itself, for the transcript of his testimony was made available to them. Moreover, the Chairman of the Committee was acting at least in a *de facto* capacity when he administered the oath to petitioner.

If, however, it was a necessary part of the Government's case to prove that a majority of the members were actually present when petitioner testified, that fact was established by the official records of the Committee which noted a majority present and did not refer to any departures of members during the session. This official record is not subject to impeachment.

II

It makes no difference in this case whether petitioner's perjuries violated the general federal perjury statute or the District of Columbia perjury statute. Both statutes are substantially identical except for the penalty provisions and the issues at the trial would have been the same under either. Petitioner's general sentence on five counts of two to six years' imprisonment was

within the maximum permissible under either statute.

III

Petitioner's demand for the private notes which Government counsel had used in selecting a jury was unwarranted. The statement of petitioner's counsel that he thought an F. B. I. investigation of the jury panel had been made was purely speculative. He did not allege that an investigation had in fact occurred, let alone that it had tended to intimidate any juror. The trial court properly refused to disqualify the panel since petitioner did not sustain his burden as a moving party to introduce or offer evidence in support of his challenge.

IV

Petitioner agreed in the Court of Appeals not to raise any points other than the foregoing three contentions. He raised for the first time in the petition for rehearing the contentions that the trial court had erred in denying his motion to take depositions or summon witnesses at Government expense, and in refusing to permit him to read part of an exhibit in evidence. Since it does not appear that the Court of Appeals passed upon those points, other than its action in denying without opinion the petition for rehearing, they should not be considered here. In any event, they are untenable on their merits since they involve matters which called for the exercise of discretion by the trial judge and there is no showing of

such abuse of discretion as would constitute reversible error.

ARGUMENT

I

THE COMMITTEE WAS A COMPETENT TRIBUNAL AT THE TIME PETITIONER TESTIFIED

A. *A quorum was present at the beginning of the session and no question of the presence of a quorum was thereafter raised.*—The trial court instructed the jury that if they found that a majority of the Committee on Education and Labor[1] were in attendance at the beginning of the afternoon session on March 1, 1947, during the course of which petitioner testified, and that at no time during the session was any question raised that a quorum was lacking, the Committee was a competent tribunal, regardless of whether or not a majority were physically present at the precise time at which petitioner took the oath and testified. By its verdict, the jury implicitly found those underlying facts. With those facts established, we submit that the competency of the Committee is not open to challenge.[2]

[1] The Committee on Education and Labor is a standing committee of the House of Representatives (Legislative Reorganization Act of 1946, c. 753, 60 Stat. 812, 822, 825; Rules X (a) (7), XI (1) (g), Rules and Manual of the House of Representatives, 80th Cong. (1947)).

[2] In *Fleischman* v. *United States* and *Bryan* v. *United States* (both decided by C. A. D. C., April 8, 1949, Nos. 9851 and 9852), convictions of making defaults by failing to produce records before the Committee on Un-American Activi-

The hearing was held pursuant to the Committee's authority to compel the attendance and sworn testimony of witnesses in connection with investigations relating to matters within its jurisdiction. H. Res. No. 111, 80th Cong., 1st sess., 93 Cong. Rec. 1452, 1457; R. 32.[3] The Commit-

---

ties of the House of Representatives were reversed because the trial judge had invaded the province of the jury in charging that "as a matter of law * * * the members of the committee before whom the defendant appeared, pursuant to the subpoenas served on them, constituted a sufficient quorum to carry on the investigation." The instant decision is clearly distinguishable, for here it was left to the jury to find, under appropriate instructions, whether a majority of the Committee "did meet at the beginning of the afternoon session of March 1, 1947, and thereafter * * * no question was raised as to the lack of a quorum" (R. 259).

[3] This resolution provided as follows:

"*Resolved*, That the Committee on Education and Labor, acting as a whole or by subcommittee, is authorized and directed to conduct thorough studies and investigations relating to matters coming within the jurisdiction of such committee under rule XI (1) (g) of the Rules of the House of Representatives, and for such purposes the said committee or any subcommittee thereof is hereby authorized to sit and act during the present Congress at such times and places within the United States, whether the House is in session, has recessed, or has adjourned, to hold such hearings, and to require by subpena or otherwise the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents, as it deems necessary. Subpenas may be issued over the signature of the chairman of the committee or any member of the committee designated by him, and may be served by any person designated by such chairman or member. The chairman of the committee or any member thereof may administer oaths to witnesses.

"That the said committee shall report to the House of Representatives during the present Congress the results of their

tee's organization and procedure were governed by the rules of the House. Rule XI (f), Rules of the House of Representatives. Accordingly, the parliamentary practice of the House, that is, its rules and precedents, determined whether the Committee was functioning as a competent body at the time petitioner gave his false testimony.

The Constitution prescribes that a majority of the House shall constitute a quorum to do business and that the House shall determine its own rules of procedure (Art. I, sec. 5). It has never been held that the debates, deliberations, or other actions of that body are unconstitutional if a majority was not in fact present, unless the absence of a quorum was duly noted by the House. "A quorum consists of a majority of the * * * members chosen, sworn, and living, whose membership has not been terminated by resignation or by the action of the House. And the House proceeds upon the assumption that that number is present unless it is established to the contrary. The lack of a quorum might be brought to the attention of the membership by a Representative making a point of no quorum, by the Speaker on his own initiative taking cognizance of the number absent, or by a vote disclosing that too few were participating. When the roll call is not automatic, the Speaker counts to determine the number present, and his count, which is an-

studies and investigations with such recommendations for legislation or otherwise as the committee deems desirable."

nounced without delay, is not subject to verification by tellers." Riddick, *The United States Congress Organization and Procedure* (1949), p. 296. Cf. Cannon's *Procedure in the House of Representatives* (1939), pp. 277-278.

The practice of the Senate is similar. "For many years prior to the last decade of the nineteenth century at the opening of the first session of a Congress it has been customary for the Presiding Officer to direct the Sergeant-at-Arms to ascertain whether a quorum of the Senate was present. Since that time, at the beginning of each regular and extraordinary session of Congress with hardly an exception the practice has been at once to determine the presence of a quorum by a roll-call of the Senate. In the daily sessions of the Senate its business goes forward unless and until the question of the presence of a quorum is raised." 1 Haynes, *The Senate of the United States* (1938), p. 358.[4]

It has been recognized that "in every legislative body large numbers of measures are permitted to take readings when a quorum is conspicuously absent. Nobody raising the question, the opposite of the fact is assumed, and very

[4] In the Senate, each standing committee is authorized to fix the number of its members (but not less than one-third of its entire membership) who shall constitute a quorum, except that, as in the House, a majority of the committee must actually be present in order to report any measure or recommendation. Rule XXV (3), Standing Rules of the Senate, Legislative Reorganization Act of 1946, *supra*, § 102.

rarely indeed with any damage to the public welfare. Questions seriously contested are certain to secure attendance." Lace, *Legislative Procedure* (1922), p. 48.

It is well established by parliamentary precedents that when the House regularly convenes, the business accomplished before the lack of a quorum is brought to the notice of the chair is not thereafter subject to challenge on that score. For example, after the journal of a preceding session has been read and approved, an objection to the journal cannot be made on the ground that a quorum was absent when the House action was taken. 4 *Hinds' Precedents*, § 2927. Likewise, objections to the validity of a committee report, on the ground that a quorum of the Committee had not been present, are untimely if made after the House has voted to consider, or has actually begun consideration of the report. 4 *Hinds' Precedents*, § 4598; 6 *Cannon's Precedents*, § 655; 8 *Cannon's Precedents*, § 2223.

The distinction between the presence of a quorum at the beginning of a session and its presence at all times thereafter was emphasized by Speaker Gillett, who ruled as follows: "The Chair was for many years a member of the Committee on Appropriations, and it is the recollection of the Chair that that committee was scrupulous that there should always be a quorum present. That, of course, does not mean—and it has occurred to the Chair that it might have happened

in this present instance—that a quorum of the committee was present every minute. Men would go in, and would go out, and come back. But the roll call must disclose that a quorum was present, and the Chair thinks that is the practice of most of the committees. But inasmuch as it is admitted here that there was no quorum present, the Chair sustains the point of order." 8 *Cannon's Precedents*, § 2222, p. 38.*

This Court has held that it will not interfere with Congressional rules of procedure so long as they do not violate fundamental rights. *United States* v. *Ballin*, 144 U. S. 1; *United States* v. *Smith*, 286 U. S. 6, 33. The *Ballin* case involved an attack upon a statute on the ground that a quorum was not present when it passed the House, notwithstanding that the Speaker had announced the presence of a quorum in accordance with a rule of the House. In sustaining the validity of this rule, the Court said (pp. 5–6):

> The Constitution provides that "a majority of each [house] shall constitute a quorum to do business." In other words, when a majority are present the house is in a position to do business. Its capacity

* The precedent cited by petitioner (Pet. 29–30) is not in point here. There was not in that instance a duly constituted committee meeting because the number of members required for a quorum never met at any time *as a unit*, whereas in the case at bar a majority of the committee was in fact simultaneously in attendance at the beginning of the afternoon session.

to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the house arises.

But how shall the presence of a majority be determined? The Constitution has prescribed no method of making this determination, and it is therefore within the competency of the house to prescribe any method which shall be reasonably certain to ascertain the fact. It may prescribe answer to roll-call as the only method of determination; or require the passage of members between tellers, and their count as the sole test; or the count of the Speaker or the clerk, and an announcement from the desk of the names of those who are present. Any one of these methods, it must be conceded, is reasonably certain of ascertaining the fact, and as there is no constitutional method prescribed, and no constitutional inhibition of any of those, and no violation of fundamental rights in any, it follows that the house may adopt either or all, or it may provide for a combination of any two of the methods. That was done by the rule in question; and all that that rule attempts to do is to prescribe a method for ascertaining the presence of a majority, and thus establishing the fact that the house is in a condition to transact business.

Judicial recognition of the parliamentary practice by which the presence of a quorum for the transaction of business is assumed in the absence of a disclosure to the contrary, by a vote or by the raising of a point of order, does not violate any fundamental right of a witness before a committee. As the court below pointed out (R. 276), it "is required by a reasonable regard for the substance of things and by the respect courts owe to Congress. It gives some protection to the public interest in discouraging perjury intended and apt to influence congressional committees, and injures no private interest except freedom of perjury." Certainly, the Chairman of the Committee was acting at least in a *de facto* capacity in administering the oath to petitioner and it has repeatedly been held that perjury may be predicated on false statements under oath administered by *de facto* officers. *Jordan* v. *United States*, 60 F. 2d 4 (C. A. 4), certiorari denied, 287 U. S. 633; cf. *Blair* v. *United States*, 250 U. S. 273; *McDowell* v. *United States*, 159 U. S. 596, 601–602. Moreover, petitioner intended to mislead not only the members present but the whole Committee and the House of Representatives. This committee meeting was one of a series which eventually resulted in a report by the Committee (H. Rep. No. 245, 80th Cong., 1st sess.), which was considered by the House without any question being raised of the validity

of the hearings, and formed a basis for the enactment of the Taft-Hartley Act.

In effect, petitioner insists that the Committee was required to suspend its hearing as soon as less than a majority was present or run the risk that he and other witnesses would testify falsely with impunity. But this contention places an undue limitation upon the right of Congressional committees and of Congress to determine their own rules of procedure. The "appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination" may, indeed, remove the quorum issue from the jurisdiction of federal constitutional courts on the ground that it is a political question. *Coleman* v. *Miller*, 307 U. S. 433, 454–455. The Committee was authorized by the House to sit at all times (H. Res. No. 111, *supra*, pp. 14–15, note 3) and members of the Committee who were absent during part or all of the testimony of a particular witness were presumably satisfied to have the hearing proceed without them and to rely upon the transcript of testimony. Otherwise they could have raised a point of no quorum and terminated the session.

Petitioner cannot pick and choose among the relevant House procedural rules; he cannot accept that provision which requires a majority of the committee to be present at the opening and reject

the correlative well-established principle that the committee remains validly constituted until the lack of a quorum is suggested. No constitutional requirement of a quorum governs committee proceedings and, indeed, the Senate regards one-third of the committee membership as sufficient to constitute a quorum. See *supra*, p. 15, note 4. Since petitioner relies, as he must, on the House rules, he is bound by all of them.

In permitting the hearing to continue, the committee members were entitled to depend upon the truth of the testimony without the qualification that sanctions to assure the truth became inoperative at any time that less than a majority were present in the hearing room. If petitioner is correct, the Government would be required to prove the exact time at which a perjurious witness testified, and the physical composition of the committee at that precise moment. In view of the fact that petitioner was under oath, knew that he was testifying before a committee which was functioning in formal session, and gave no warning to the Committee that he did not regard himself as bound by his oath, such a strict requirement of proof is not warranted by any regard for fundamental rights of witnesses.

It is immaterial whether petitioner had the right to raise the issue of no quorum and thus stop further proceedings until the presence of a quorum was established. We think that the Committee would have remained competent unless

the correlative well-established principle that the committee remains validly constituted until the lack of a quorum is suggested. No constitutional requirement of a quorum governs committee proceedings and, indeed, the Senate regards one-third of the committee membership as sufficient to constitute a quorum. See *supra*, p. 16, note 4. Since petitioner relies, as he must, on the House rules, he is bound by all of them.

In permitting the hearing to continue, the committee members were entitled to depend upon the truth of the testimony without the qualification that sanctions to assure the truth became inoperative at any time that less than a majority were present in the hearing room. If petitioner is correct, the Government would be required to prove the exact time at which a perjurious witness testified and the physical composition of the committee at that precise moment. In view of the fact that petitioner was under oath, knew that he was testifying before a committee which was functioning in formal session, and gave no warning to the Committee that he did not regard himself as bound by his oath, such a strict requirement of proof is not warranted by any regard for fundamental rights of witnesses.

It is immaterial whether petitioner had the right to raise the issue of no quorum and thus stop further proceedings until the presence of a quorum was established. We think that the Committee would have remained competent unless

the point of order was made by a member. But it was at least incumbent upon petitioner to make known his opposition to testifying before less than a majority, so that if his opposition were deemed meritorious by any member, an opportunity would have been afforded for absent members to have been summoned.

The practice of other multiple-member agencies, such as three-judge courts and municipal boards and councils, to which petitioner refers, is distinguishable. In those instances, the constituting authority determined that competency of the particular tribunal or body required the presence of a quorum throughout the proceedings. Here, on the other hand, the House of Representatives, the constituting authority of the Committee, authorized and approved the practice whereby the competency of the Committee, no less than its parent, continued despite the presence of less than a majority of the members until such times as the absence of a quorum was suggested. The only restriction imposed by the House was that "no measure or recommendation shall be reported from any such committee unless a majority of the committee were actually present." § 133 (d), Legislative Reorganization Act of 1946, *supra*; cf. 8 *Cannon's Precedents*, §§ 2209, 2211–2212, 2220, 2249. This express reference to the actual presence of a majority of the Committee members when a report is voted is a tacit recognition that other business, such as the taking

of testimony, may be conducted without that requirement. And the relative importance of the actual vote by which reports are submitted for House action, and the role which is played by political parties in such action, as contrasted with the preliminary task of ascertaining facts which, in any event, are embodied in a transcript available to all members,[6] clearly justified the emphasis upon the presence of a majority in the voting stage even though it is not required in the fact-collecting stage.

Petitioner argues that the courts below erroneously found the Committee competent on the basis of a presumption of continuity which properly should have given way to the overriding presumption of innocence. But the competency of the Committee does not rest upon a presumption that those members, comprising a majority, who were present at the outset of the afternoon session continued to be present throughout the time that petitioner testified. To the contrary, it is immaterial how many were present at that time so long as 13 or more members were present at the beginning of the session and no point was raised at any time thereafter that less than 13 were in attendance. If a "presumption" exists, it is that which is made conclusive by parlia-

[6] Cf. § 141, Rules of the House of Representatives: "The Librarian of the Library of Congress is authorized and directed to have bound at the end of each session of Congress the printed hearings of testimony taken by each committee of the Congress at the preceding session."

mentary practice, which recognizes a regularly convened committee as competent until such time as the point of no quorum is raised. The presumption of petitioner's innocence was fully overcome by proof beyond a reasonable doubt that, as defined by the House of Representatives, the Committee was competent at the time he testified.

Petitioner argues (Pet. 33–36) that the instruction of the trial court was at variance with the charge in *United States* v. *Stewart* (D. C. D. C., November 20, 1928, unreported). His labored analysis of the Stewart charge is at odds with the interpretation placed upon the charge by the Court of Appeals (R. 276, n. 1) and by Clarence Cannon, an outstanding authority on parliamentary law, who cited the case for the proposition, on which we support the trial court's instruction, that "if a quorum be present and subsequently Members leave temporarily or otherwise a quorum is presumed to be present until and unless the question of no quorum is raised." 6 *Cannon's Precedents*, § 345, syllabus.

B. *The official records of the Committee conclusively establish the presence of a quorum at the time petitioner testified.*—Up to this point, we have shown that the Committee was competent because a majority of the 25 members were in attendance at the beginning of the session and the absence of a quorum was not suggested at any time during the session. It was unnecessary, therefore, for the Government to prove that at the

precise time petitioner took the oath and testified at least 13 members were physically present. If, however, that fact should be deemed material, we contend that it was conclusively established by the official records of the Committee which were admitted in evidence. The Journal disclosed that the Committee met at 10 a. m., March 1, 1947, and adjourned at 5:25 p. m. and that 15 members were "Present" (R. 41). The tally sheet, Government's Exhibit 4, showed 14 members present at the afternoon session (R. 38). So far is is shown by these records and the transcript of proceedings, which together comprise the official records of the Committee, no less than a majority were present throughout the session. It is quite probable that some of the members may have left the hearing room from time to time in the course of the three-hour afternoon session, but in view of the silence of the legislative record on such departures, we must, in deference to the record, assume that all who were recorded as present continued so throughout the proceedings.

This conclusion is consistent with the principle that enrolled statutes are not impeachable by proof of irregularity in their enactment, and certainly not by evidence outside the journal. *Field* v. *Clark*, 143 U. S. 649; *United States* v. *Ballin*, 144 U. S. 1; *Portland Gold Mining Co.* v. *Duke*, 191 Fed. 692, 695–696 (C. A. 8); *Ames* v. *Union Pacific Ry. Co.*, 64 Fed. 165, 167–170 (D. Neb.),

affirmed, 169 U. S. 466; 1 *Hinds' Precedents*, § 563; 4 *id.* § § 2961, 2962; 4 Wigmore, *Evidence* (1940 ed.) § 1350. It is well established, even as to local legislative proceedings, that evidence of a different fact from that recorded, offered for the purpose of contradicting or altering official records, is inadmissible. *Penton* v. *Brown-Crummer Invest. Co.*, 222 Ala. 355; Annotation, *Admissibility of Parol or Extrinsic Evidence to Alter or Supplement Written Records of Local Legislative Bodies*, 98 A. L. R. 1229. Similarly, parol evidence offered to impeach court records has been excluded, as in *United States* v. *Walsh*, 22 Fed. 644 (D. Mass.), which also involved an attack by an alleged perjurer upon the competency of the tribunal.

It appears, therefore, that even upon petitioner's contention that the Government was required to prove the actual presence of 13 or more members of the Committee at the time he testified, the only evidence which was competent for that purpose conclusively established that fact. Petitioner's argument that the transcript of testimony itself disclosed the lack of a quorum by showing those members (less than 13) who were called upon by the Chairman, is unsound. The practice whereby the Chairman called upon members in turn to afford them an opportunity to interrogate the witnesses was not intended as a roll call. The references to those particular members who were called upon in this manner

does not establish that only those members were present. Other members indicated by a nod or other sign that they had no questions to ask (R. 55–56, 90–91, 97), and consequently, their names were absent from that portion of the transcript.

II

THE GENERAL FEDERAL PERJURY STATUTE AND THE DISTRICT OF COLUMBIA PERJURY STATUTE ARE SUBSTANTIALLY IDENTICAL, DIFFERING ONLY IN THEIR TERRITORIAL APPLICATION AND THE PENALTIES PRESCRIBED; SINCE BOTH APPLY IN THE DISTRICT OF COLUMBIA AND THE SENTENCE IMPOSED WAS WITHIN THE MAXIMUM PERMISSIBLE UNDER EITHER, IT IS IMMATERIAL IN THIS CASE WHICH STATUTE PETITIONER VIOLATED

Petitioner urges (Pet. 43–49) that the indictment should have been drawn under the general federal perjury statute (Criminal Code of 1909, § 125, *supra;* p. 3) rather than under the District of Columbia perjury statute (22 D. C. Code [1940 ed.] 2501, *supra,* pp. 3–4). He argues that the former is applicable here because his perjured testimony was given before a congressional committee that was inquiring into matters "national in character and scope" (Pet. 46), and that consequently the fact that the perjuries occurred in the District of Columbia was irrelevant (Pet. 47).

The question whether perjury before a committee of Congress in the course of hearings relating to a matter of national concern, but com-

mitted in the District of Columbia, is governed by the general federal perjury statute or by the perjury section of the District of Columbia Code is admittedly not entirely free of doubt. On the one hand, petitioner would seem to come literally within the category of persons for whose punishment the local perjury statute provides, *viz.*, a "person who, having taken an oath * * * before a competent tribunal, officer, or person, in any case in which the law authorized such oath * * * to be administered, that he will testify * * * truly; * * * wilfully and contrary to such oath * * * states * * * any material matter which he does not believe to be true, shall be guilty of perjury; * * *." On the other hand, he would seem equally to come within the category of persons for whose punishment the general federal statute provides.[7] And there can be no doubt that the general federal perjury statute is applicable in the District of Columbia. *Johnson* v. *United States*, 225 U. S. 405, 413–414.[8]

[7] Indeed, there is no substantial difference between the two statutes in so far as they define the crime of perjury. The only difference is that the general federal statute, in referring to the law under which the authority to administer the oath is conferred, uses the words "a law of the United States," whereas the local statute refers merely to "the law."

[8] The general federal perjury statute was contained in chapter 6 of the Criminal Code of 1909, 35 Stat. 1111. The Government conceded in the *Johnson* case (No. 1075, O. T. 1911, Government's brief, p. 10), and this Court found no difficulty in accepting the concession (*Johnson* v. *United*

Regardless, however, of whether petitioner is right in his contention that an indictment for perjuries of the type of which he was convicted should be brought under the general federal statute, it does not follow that the error, if any, vitiates his conviction. The two statutes, as we have indicated, are substantially identical with the exception of the penalty provisions. The language of the indictment conforms to the rule requiring "a plain, concise and definite written statement of the essential facts constituting the offense charged" (Rule 7 (c), F. R. Crim. P.), and it clearly stated offenses within the general federal statute. Assuming that the latter statute governs, the mere fact that the District of Columbia statute was cited in the caption and that it was believed by the prosecutor and court that the local statute applied is not ground for reversal unless prejudice is shown. *United States* v. *Hutcheson*, 312 U. S. 219, 229; *Williams* v. *United States*, 168 U. S. 382, 389; Rule 7 (c), F. R. Crim. P. There was no prejudice. Petitioner was fully informed of the charge. He would have been tried in the same court, by the same judge, jury, and prosecutor, and the issues at the trial would have been precisely the same, regardless of which of the two statutes applied.

States, *supra*, at 413–414), that the first ten chapters as well as the twelfth chapter of the Criminal Code are applicable in the District of Columbia since they "deal with offenses Federal in their nature."

Petitioner's contention that there was prejudice because he was sentenced to a maximum of six years' imprisonment whereas under the general federal statute the maximum is five years (Pet. 49) is without merit. Petitioner was convicted on five separate counts[9] and was sentenced generally on all of them. The six-year term was therefore valid, since it is well settled that a general sentence on several counts is valid if it does not exceed the aggregate punishment which could have been imposed on all. *In re De Bara*, 179 U. S. 316; *Levine* v. *Hudspeth*, 127 F. 2d 982, 984 (C. A. 10), certiorari denied, 317 U. S. 628; *McKee* v. *Johnston*, 109 F. 2d 273, 275 (C. A. 9), certiorari denied, 309 U. S. 664; *Ross* v. *Hudspeth*, 108 F. 2d 628, 629 (C. A. 10); *United States* v. *Sposato*, 73 F. 2d 186, 187 (C. A. 2); *Jones* v. *Hill*, 71 F. 2d 932 (C. A. 3); *Warden of United States Penitentiary Annex* v. *DeLondi*, 62 F. 2d 981, 982 (C. A. 10); *Flynn* v. *United States*, 57 F. 2d 1044, 1047 (C. A. 8), certiorari denied, 287 U. S. 627; *Hawkins* v. *United States*, 14 F. 2d 596, 597–598 (C. A. 7), certiorari denied,

[9] Separate false statements are separately indictable, even though all relate to the same general subject of inquiry and are made at the same hearing. *Seymour* v. *United States*, 77 F. 2d 577, 581 (C. A. 8); *United States* v. *Cason*, 39 F. Supp. 731, 734–735 (W. D. La.). It is evident that the false statements ascribed to petitioner in the separate counts of this indictment, though all were linked to the same general subject matter, each represented a different facet of his relations with the Communist Party.

273 U. S. 740; *Rice* v. *United States*, 7 F. 2d 319, 321 (C. A. 9); *Neely* v. *United States*, 2 F. 2d 849, 852–853 (C. A. 4).[10]

III

NO VALID CHALLENGE OF THE JURY PANEL WAS MADE.

Petitioner contends that his constitutional right to trial by an impartial jury was impaired by the failure of the trial court to inquire whether the Government had obtained through an F. B. I. investigation any information about the jury panel which was not available to him. The short answer to this contention is that petitioner neither asked the court to make any such inquiry nor sought an opportunity to offer evidence in support of his challenge to the panel. Petitioner's counsel merely noted that Government counsel had papers which "apparently contain additional information" about the jurors, and he asked for a copy "so that we may have the same benefit of the same information that the Govern-

[10] It should be observed that, if petitioner is correct in his contention that the general federal statute applies, he should have been fined as well as sentenced to imprisonment, since that statute, unlike the local statute, makes the imposition of both fine and imprisonment mandatory. The failure to impose a fine, however, would, of course, be "an error of which the defendant does not and cannot complain." *Jordan* v. *United States*, 60 F. 2d 4, 6 (C. A. 4), certiorari denied, 287 U. S. 633; *Flynn* v. *United States*, 50 F. 2d 1021, 1022 (C. A. 7); *Nancy* v. *United States*, 16 F. 2d 872 (C. A. 9), certiorari denied, 274 U. S. 745; *Bartholomew* v. *United States*, 177 Fed. 902, 906 (C. A. 6), certiorari denied, 217 U. S. 608; cf. *Bozza* v. *United States*, 330 U. S. 160, 165–167.

ment has," and, further, "If it is true, as I think from the sheets that I see in the Government's possession, that they have had an F. B. I. investigation made of the jury, I raise that * * * as an objection to this panel * * *" (R. 29–30).

The Government is not required to furnish defense counsel with its private notes which it uses in selecting a jury. The interests of justice do not require the prosecutor to disclose his reasons for accepting or peremptorily challenging any prospective jurors. Petitioner's challenge to the panel was based solely on speculation, unsworn and unsupported by proof or offer of proof, that an F. B. I. investigation of the prospective jurors had been made. In view of petitioner's failure even to flatly allege that an F. B. I. investigation had been made and to sustain his burden as a moving party of introducing or offering evidence in support of his challenge, the trial court properly refused to disqualify the panel. *Frazier* v. *United States*, 335 U. S. 497, 503; *Glasser* v. *United States*, 315 U. S. 60, 87; *Martin* v. *Texas*, 200 U. S. 316; *Tarrance* v. *Florida*, 188 U. S. 519; *Smith* v. *Mississippi*, 162 U. S. 592. Even if petitioner had proved or offered to prove that the panel had been investigated by the F. B. I., his objection would have fallen short of legal sufficiency. He did not allege that any juror was aware that he had been investigated, or that the investigation, if any, had a tendency to intimidate the jurors, let alone that

they had in fact been intimidated or rendered partial. *Sinclair* v. *United States*, 279 U. S. 749, upon which petitioner relies, is thus not germane. Moreover, that case, in which this Court held that shadowing of jurors during the course of a trial may constitute contempt of court, whether or not the jurors are conscious of it, does not support petitioner's contention that any investigation of prospective jurors, with or without their knowledge, automatically disqualifies them from jury duty. That decision had nothing whatever to do with the question of disqualification of a jury panel.

IV

THERE WAS NO ERROR IN THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION TO SUBPOENA WITNESSES AT GOVERNMENT EXPENSE OR TO TAKE THEIR DEPOSITIONS

Petitioner argues that the denial by the trial court of his motion to subpoena certain witnesses at Government expense or, in the alternative, to order their depositions taken and adjourn the trial for that purpose deprived him of his constitutional right to a fair trial. Petitioner abandoned this point by stipulation in the Court of Appeals (R. 272–274; see pp. 9–10, *supra*) and raised it for the first time after decisions in a petition for rehearing, which was denied without opinion (R. 282–284).[11]

[11] The petition for rehearing also presented for the first time the contention that the trial court erred in refusing to permit petitioner to read to the jury part of the transcript

This Court has repeatedly said that it will not pass upon issues not pressed in the Court of Appeals. *Sonzinsky* v. *United States*, 300 U. S. 506, 514; *Husty* v. *United States*, 282 U. S. 694, 701–702; *Duignan* v. *United States*, 274 U. S. 195, 200. In view of petitioner's abandonment of these issues previously, the petition for rehearing did not require the Court of Appeals to pass upon them (*Nailling* v. *United States*, 142 F. 2d 551 (C. A. 6); *Lee* v. *United States*, 91 F. 2d 326, 332 (C. A. 5), certiorari denied, 302 U. S. 745; *Tinkoff* v. *United States*, 86 F. 2d 868, 884 (C. A. 7), certiorari denied, 301 U. S. 689) and, except for the formal recital, "On consideration of appellant's petition for rehearing", which appears in the *per curiam* order denying the petition (R. 284), there is no indication that any consideration was given below to these issues.

It is clear, moreover, that petitioner's contentions are untenable on their merits for he has not shown such abuse of discretion by the trial judge as would constitute reversible error.

---

of the Committee hearing which had been admitted as a Government exhibit and from which Government counsel had read another part. This contention is specious. Petitioner attempted to read the portion of the transcript which related to the Allis-Chalmers strike, which was extraneous to the charge of perjury on which he was being tried, and the judge properly concluded that no purpose would be served in consuming the time of the court by reading such irrelevant matter. In any event, since the entire transcript was in evidence and was thus available to the jury, we fail to see how petitioner was prejudiced.

Goldsby v. *United States*, 160 U. S. 70, 73; *Crumpton* v. *United States*, 138 U. S. 361, 365; *Dupuis* v. *United States*, 5 F. 2d 231 (C. A. 9); *Gibson* v. *United States*, 53 F. 2d 721 (C. A. 8), certiorari denied, 285 U. S. 557; *Wong Yip* v. *United States*, 118 F. 2d 667 (C. A. 9), certiorari denied, 313 U. S. 589. Neither the printed record nor the original record on file in this Court discloses the bases for the trial court's action, but it appears that on February 11, 1948, when petitioner filed his motion to secure the attendance of witnesses at the expense of the Government or, as an alternative, to delay the trial for the purpose of taking depositions, more than six months had elapsed from the filing of the indictment (R. 28) and only a few days remained before the trial was to begin on February 16, 1948. Apart from the apparent untimeliness of the motion, the trial judge might properly have found the application insufficient under Rules 17 (b) and 15 (a), F. R. Crim. P. since the proposed testimony of these witnesses was merely cumulative character evidence. As it turned out, other witnesses appeared in his behalf for that purpose, and petitioner was, therefore, not prejudiced.

CONCLUSION

For the reasons stated, we respectfully submit that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
Assistant Attorney General.
ROBERT S. ERDAHL,
HAROLD D. COHEN,
PHILIP R. MONAHAN,
Attorneys.

APRIL 1949.